

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
1015 HALF STREET S E  
WASHINGTON, DC 20570-0001

**OS-DB-JV2-LLC**

**Employer**

Case No. 12-RC-294302

**and**

**SINDICATO PUERTORRIQUEÑO  
DE TRABAJADORES Y  
TRABAJADORAS, LOCAL 1996,  
SERVICE EMPLOYEES  
INTERNATIONAL UNION**

**Petitioner.**

**EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S  
DECISION AND ORDER AND REQUEST TO STAY ELECTION**

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## TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
FACTUAL BACKGROUND	2
ARGUMENT	
I.    Legal Standard	2
II.   The Region issued faulty election documents that taint the necessary laboratory conditions	3
III.  The Region did not support its decision on a mail ballot election	7
A. The election should be a manual election	9
B. Aspirus is inapplicable to this election	12
C. A manual election is necessary	16
CONCLUSION	19

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
Kraft, Inc. Retail Food Group 273 N.L.R.B. 1484 (1985)	6 - 7
General Shoe Corp. 77 N.L.R.B. 124 (1948)	6
Fibre Leather Mfg. Corp. 167 N.L.R.B. 393 (1967)	6 - 7
Rattan Art Gallery, Ltd. 260 N.L.R.B. 255 (1982)	6
Starbucks Corporation v. Workers United 12-CA-291975	8
Shepard Convention Services, Inc. v. N.L.R.B., 85 F3d 671 (D.C. Cir. 1996)	9
Alaska Roughnecks and Drillers Ass’s v. N.L.R.B., 555 F.2d 732, 735 (9 <sup>th</sup> Cir. 1977)	9
Aspirus Keweenaw 370 N.L.R.B. No. 45 (Nov. 9, 2020)	10
South Bay United Pentecostal Church, et al v. Newwom, 590 U.S. _____ (2020)	11
New York v. Cuomo, 592 U.S. _____ (2020)	11
Health Freedom Defense Fund v. Biden, (M. Dist. Fla Case No. 8:21-cv-1963)	12
Cen Trio Energy South LLC and UA Plumbers, 371 N.L.R.B. No. 94	12

## **TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE(S)</b>
Natal v. Romero, Civil No. SJ2021CV00284	16
San Diego Gas & Electric, 325 N.L.R.B. 1143, 1144 (1998)	17
Starbucks Corporation & Workers United, Case 12-RC-29197 (April 13, 2022)	17

## **PRELIMINARY STATEMENT**

Pursuant to Sections 102.69 and 102.67 of the Board's Rules and Regulations, the Petitioner, ("OS-DB-JV2-LLC" or "Employer") requests review of the Regional Director's Decision and Direction of Election, and requests the Board to stay the election. Compelling reasons for review exist under § 102.67(d)(1)(i) because a substantial question of law or policy is raised by the departure of officially reported Board precedent. The Regional Director's decision places an unfounded burden on the Respondent that is not justified by the Board's Final Rule concerning Representation-Case Procedures, published at 79 Fed. Reg. 74307 (Dec. 15, 2014) ("Election Rule"). Compelling reasons for review also exist under § 102.67(d)(1)(i), because the Regional Director imposed a burden on the Respondent that cannot be found in officially reported Board precedent. If the Board determines that the Regional Director properly applied the Election Rule, the Board should reconsider its interpretation of the Election Rule as it denies an employer the opportunity to challenge a substantive legal issue, which is preferred by the Board. Thus, compelling reasons for review exist under § 102.67(d)(4) as well.

Due to the inadequate translation of election documents, the refusal to translate the Region's Order, the arbitrary decision of a mail election that is not based on the record, and potential harm to employers, employees, and the parties here, it is imperative that the Board stay the election until the issues are reviewed

accordingly.

## FACTUAL BACKGROUND

*Sindicato Puertorriqueño de Trabajadores y Trabajadoras Local 1996, Service Employees International Union* (“Petitioner”) filed the representation case petition on April 19, 2022 and requested a manual election.<sup>1</sup> The employer filed its position statement. A hearing was held on May 10, 2022. The parties stipulated that a manual election would be held for the employees in San Juan and a mail ballot election for the employees that work in the towns of Ponce and Mayaguez. The Region unilaterally ignored the stipulation and ordered a full mail ballot election on May 25, 2022.

## ARGUMENT

### I. Legal Standard.

The NLRB may grant review of Regional Director actions in certain circumstances. Specifically, review may be granted where:

1. a substantial question of law or policy is raised because of: (i) the absence of; or (ii) departure from, officially reported Board precedent.
2. the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party.
3. the conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or

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<sup>1</sup> All dates, unless otherwise stated, are 2022.

4. there are compelling reasons for reconsideration of an important Board rule or policy.

*See* NLRB Rules and Regulations § 102.67(d). The Employer's Request for Review in this case is premised on the first section of the first ground as well as the fourth ground: (1)(i) the absence of officially reported Board precedent; and and (4) there are compelling reasons for reconsideration of an important Board rule or policy.

**II. The Region issued faulty election documents that taint the necessary laboratory conditions.**

On May 25, 2022, Region 12 issued a Decision and Direction of Election in the instant matter. The Region determined that the bargaining unit was:

All full-time and regular part-time maintenance and janitorial employees employed by the Employer at Veterans Administration facilities in San Juan, Ponce and Mayagüez, Puerto Rico, excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined by the Act.  
See Order, p.8.

The Region ordered a mail election to be held between June 8, 2022, and July 6, 2022. Since it is a mail ballot election, the Region ordered that:

... [t]hose employees who believe that they are eligible to vote and did not receive a ballot in the mail by June 16, 2022, should communicate immediately with the National Labor Relations Board by either calling the Region 12 Office at (787)523-8285 or (787)523-8940.

See Order, p. 9.

To notify the employees of the election and their right to determine whether

they are a part of the bargaining unit, the Region ordered the Employer to post copies of the Notice of Election and the Order in “conspicuous places” at least three (3) full working days prior to the election. The Employer has complied with said Order.

Sec. 11315.2 of the Case Handling Manual provides access of ballots and other documents to foreign language voters. Considering that a substantial majority of the employees are not fluent in English, the Region issued two Notices of Election, one in English and another in Spanish. Even though the Region knows that most of the employees are not fluent in English, it did not issue a Spanish version of its order. One must question how non – English voters will understand the Order written in English that is posted in their work sites. Sec. 1134.1 of the Case Handling Manual provides that the Notice of Election should contain:

... the printed portion thereof with appropriate insertions in the sample ballot, description of the electorate (bargaining unit as modified by eligibility date and the Board’s normal additions and exclusions), the date, place and hours of the election and, in split-session, multiple-site, and mail ballot of elections, it should contain the date, time and place where ballots will be mingled and counted.

Pursuant to Sec. 1134.1 the Notice of Election must provide a description of the bargaining unit. The Notice of Election in Spanish (the “Spanish Notice”) does not include an adequate description of the bargaining unit. The Sample Ballot of the Spanish Notice describes the bargaining unit as:



*Todos los empleados de mantenimiento y limpieza a tiempo completo y a tiempo parcial empleados por el patrono sirviendo en las facilidades del Veterans Administration en San Juan, Ponce y Mayagüez quienes fueron contratados por el Empleador durante el periodo de la nómina que termina en May 20, 2022.*

The translation of the description of the bargaining unit included in the Spanish Notice of Election is:

All the maintenance and janitorial employees that work full time and part-time that work for the employer and offer their services in the facilities of the Veterans Administration in San Juan, Ponce and Mayagüez, who were hired by the Employer during the period that ended on May 20, 2022.

The description of the bargaining unit in the Spanish Notice is different than the one included in the Order and the English Notice. **The description included in the Order emphasizes that only regular part-time workers may be part of the bargaining unit.** The Region determined that it could alter the bargaining unit in the Spanish Notice.

There is a difference in defining part-time voters as regular or irregular, which is what the Region did. It leads to confusion as to who has the right to receive the mail ballots, can request it from the NLRB and vote. **For the English speaking electors, the bargaining unit includes regular part-time workers, from the Spanish electors it is not clear the status or nature of the part-time workers. The Region created a separate and unequal group of voters.**

It is hornbook law that a translation must be adequate and correct. An incorrect translation of the bargaining unit in the Spanish Notice affects the requisite laboratory conditions needed for an election.

In *Kraft, Inc. Retail Food Group*, 273 N.L.R.B. 1484 (1985), the Board held that: “it is the Board’s responsibility when a multilingual ballot is deemed appropriate to supply a ballot that can be comprehended in all the languages appearing on the ballot.” Citing *General Shoe Corp.* 77 N.L.R.B. 124 (1948) and *Fibre Leather Mfg. Corp.*, 167 N.L.R.B. 393(1967).

The role of the Board in the election procedure is not limited. Quite the contrary. It is well settled that adequate laboratory conditions for free expression are needed. *Id*, citing *Rattan Art Gallery, Ltd.* 260 N.L.R.B. 255(1982). In *General Shoe Corp.*, 77 N.L.R.B. 124(1948), the Board held that:

In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. **It is our duty to establish these conditions, it is also our duty to determine whether they have been fulfilled.**

That is the case here. The Region dropped the ball by altering the definition of the bargaining unit and creating confusion among the employees.

The remedy for the Region’s mistake is to immediately stay the election. If not, the votes will be impounded, the election will be set aside and a new election will be held with the correct documents. See *Fibre Leather Manufacturing Corp.*, 167

N.L.R.B. 393(1967) (Accordingly, we shall set the election aside and direct that a new election be held in which the Notice and ballots are bilingual.)

The Board should not disregard the seriousness of the inadequate translation and incorrect description of the bargaining unit in the Spanish Notice and Spanish Sample Ballot. The Spanish Notice and the Spanish Sample Ballot **are seriously defective on its face** “as to interfere with the employees’ ability to exercise their election clause.” See Kraft, Inc. Retail Food Group, supra.

Pursuant to the incorrect description of the bargaining unit in the Spanish Notice and Sample Ballot, the Board should immediately stay the election until the matter is resolved.

### **III. The Region did not support its decision on a mail ballot election**

A few weeks after deciding that a manual election in Hialeah, Florida, where the vaccination rate is substantially less than that of the employees in the instant case, the Region decided that a mail ballot election was required in Puerto Rico. In this case, all of the Employer’s employees are 100% vaccinated and received a booster shot. That is a remarkable percentage and almost unique.

The employer and the union stipulated that a manual election could be held in San Juan and a mail ballot election for the employees in Ponce and Mayaguez. The parties agreed that the manual election could take place in an open metro

station during several hours.

The Region disregarded every stipulation and request made by the parties. For inexplicable reasons, the Region decided that it would perform its very own unsupported analysis of the metro station and allege that said station is too busy. Evidently, this stems from a self-serving Google research rather than someone on the ground. The Region determined that

[a]lthough **there is no record evidence** about the extent of traffic at the train station, it is likely that traffic at the train station is continual and busy during at least some portions of voting periods, because the city of San Juan has an estimated population of 337,300.  
See Order, p. 3.

The Region admits that “there is no record evidence” to support its conclusion and speculates that traffic is continual and busy. Unfortunately, train ridership is extremely low in San Juan and metro stations are never full. It is evident that the Region made up a conclusion to ignore the location chosen by the union and the employer for the election. In *Starbucks Corporation v. Workers United*, 12 – RC – 291975, the Region decided that a manual election could be held in a classroom in a recreational center located 1.7 miles from the employer’s site. When it decided to use said site, the Region did not consider that it was a closed room, full of children playing and screaming and almost two miles from the work site. In our case, the Region disregarded an open site that is located 700 meters from the Veterans’ hospital in San Juan. In fact, the employees in the first and largest

shift park their vehicles in the train station parking lot, thus having to walk by the place in which the manual election would be located. During later shifts, employees are allowed to use the hospital parking lot. Starbucks was decided on April 13, 2022. A month later, the same Region and Regional Director made a different analysis in our case. The reasons for a change in the analysis are not explained, if there is an adequate and legal explanation. The Region ignored that its reasoning and determinations must be grounded on the record. *See Shephard Convention Services, Inc. v. N.L.R.B.*, 85 F3d 671 (D.C. Cir. 1996); see also *Alaska Roughnecks and Drillers Ass'n v. N.L.R.B.*, 555 F.2d 732, 735 (9th Cir. 1977) (“The conceptual basis for our decision is due process. Its application to NLRB proceedings, like other administrative proceedings, is not novel”).

#### **A. The election should be a manual election**

Since March 2020, the United States has been hit with the COVID -19 pandemic. **However, May 2022 is not March 2020.** As of today, three vaccines have been approved by the Food and Drug Administration (hereinafter “FDA”). The Pfizer and Moderna vaccines are 95% effective. The Johnson & Johnson vaccine is 70% effective. Also, there are boosters available for all individuals and second booster alternatives for a large group of employees who are older than fifty (50) or have certain health conditions.

The Centers for Disease Control and Prevention (“CDC”) note that “[c]urrently authorized vaccines in the United States are highly effective at protecting vaccinated people against symptomatic and severe COVID-19. Additionally, a growing body of evidence suggests that fully vaccinated people are less likely to have asymptomatic infection or transmit SARS COV – 2 to others<sup>2</sup>.” All the employees that will vote in the were vaccinated. Pursuant to local mandates, they had to be vaccinated or present proof of negative tests to work in the VA.

In *Aspirus Keweenaw*, 370 N.L.R.B. No. 45 (Nov. 9, 2020), the Board held that certain elements could be considered by a Regional Director in determining whether a manual or a mail ballot election should be held. The success of the vaccination program in the United States and the Commonwealth, along with the strict local mask wearing mandates establish a stark difference than the factors considered by the NLRB in *Aspirus*. All of this was ignored by the Region in its Order. It seems that the Region cannot even consider that there is a strict mask wearing culture in the Commonwealth.

Eighteen months have passed since the NLRB issued the ruling in *Aspirus*. This might not be much time in pre-pandemic times. However, in pandemic times **it is a lifetime**. For example, in May 2020 the Supreme Court denied a request from

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<sup>2</sup> See [www.cdc.gov](https://www.cdc.gov).

a church in California blocking the enforcement of an executive order on attendance at religious services. See *South Bay United Pentecostal Church, et al v. Newsom*, 590 U.S. \_\_\_\_ (2020). Six months later in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. \_\_\_\_ (2020), the Supreme Court granted a similar request and changed the previous ruling. Explaining the rationale, Justice Gorsuch noted that:

At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic’s shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.

Emphasis added

**The circumstances changed between May and November 2020 for the Supreme Court.** They also changed for the United States Government, except for Region 12. Federal agencies are no longer requiring masking indoors. The CDC issued a recent guideline related to the “Use and Care of Masks”, which states that in communities where the community level is low or medium masking is not mandatory, it is only recommended if the individual is immunocompromised or at high risk for severe illness.<sup>3</sup>

Recently, the U.S. District Court in *Health Freedom Defense Fund v. Biden*,

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<sup>3</sup> See [www.cdc.gov](http://www.cdc.gov)

(M.Dist. Fla Case No. 8:21-cv-1693), held that the CDC could not sustain its mask mandate policy in public transportation. Likewise, the circumstances have changed for the Board since November 2020. When *Aspirus* was decided, the FDA had not authorized a single vaccine, and none was distributed.

The pandemic never paralyzed the Commonwealth. The Commonwealth established a strict mask wearing mandate since March 2020. All the employees are required to wear masks in indoor settings. This allowed the Commonwealth to avoid a huge COVID crisis, in comparison with other states and countries. The Commonwealth's hospitals have never been overwhelmed and have provided the adequate care to its citizens.

***B. Aspirus is inapplicable to this election***

Since November 9, 2020, the Regional Directors have used *Aspirus* to determine whether manual or mail in ballot elections should be held. However, in *Aspirus* the parties or the Regional Director did not question the efficacy of the United States Postal System ("USPS") in that jurisdiction. The Board noted that: "the Regional Director indicated that ... there was no evidence that the mail service in Wisconsin and Michigan had been disrupted." See *Aspirus, supra*, fn4.

The issue of faulty mail service was recently noted by the NLRB. On April 28, 2022, the Board issued an Order on *CenTrio Energy South LLC and UA Plumbers*,



371NLRB No. 94. In said case, there was a controversy regarding whether the mail service should be used for elections. The facts are simple: the Region mailed ballots to fourteen (14) employees. **The Region only received three (3) ballots by the due date and the employer presented an offer of proof including photos and video that six (6) additional employees mailed their ballots within one (1) or two (2) weeks before the due date.**

The fact that the Region only received three (3) out of fourteen (14) ballots altered the Board's analysis of mail balloting. First, Chairman McFerran issued a lengthy statement regarding the Board's limited remote voting options and Congress' express policy statement that "the agency may not conduct elections electronically."

Second, the Board issued the following mandate to Regional Directors: **"Thus, going forward, we encourage Regional Directors to carefully consider the realities of mail service in their area when determining the notifying period for mail - ballot elections."**

Said order requires the Regional Director to examine and analyze the realities of mail service in Ponce, Mayagüez and San Juan. The proper service of the USPS is a key element that must be considered by the Regional Director in any mail ballot election. **Unfortunately, the mail service in Puerto Rico is in a state of chaos.** For years, Puerto Ricans have indicated their despair and distraught with

the service of the USPS in Puerto Rico. Dozens of complaints regarding the mail service have been lodged regarding the postal service in Puerto Rico. Hundreds of packages and correspondence are left out in the open, where they are soaked and damaged with the rain and other conditions.

**The Vice-President of the American Postal Workers Union (“APWU”) recognized the emergency and the dire conditions of post offices in the Commonwealth.** The APWU argues that the post office handles an amount of 60% additional packages and correspondence and did not hire employees during the pandemic.

A spokesperson of the USPS, Xavier Hernández, was interviewed in relation to the situation. **He did not contest the emergency and dire conditions of the correspondence and delays processing it.**<sup>4</sup> Thus, the APWU and the USPS accept that the current condition of the postal service in Puerto Rico cannot be trusted.

**The emergency is so serious that Puerto Rico’s sole congresswoman, Rep. Jennifer González Colón requested immediate action from the USPS. Rep. González is Puerto Rico’s only elected official in the United States government and represents the citizens of the Commonwealth.**

On April 23, 2021, Rep. González wrote to Mr. Louis DeJoy, the Postmaster General. Rep. González indicated that she was requesting that the USPS act

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<sup>4</sup> See [www.endi.com](http://www.endi.com)

concerning the **“urgent state of postal affairs** in the municipality of Guaynabo, Puerto Rico, and the **island overall.”** Rep. González emphasized that thousands of postal packages **“are not only delayed but being kept outside, under tents or out in the open subject to the elements, such as rain.”** Also, she noted that “the Post Office is not recruiting on the island.”

Finally, she pleaded with the Postmaster by indicating that “[m]ail offices often serve as the core tenet to a community in rural and remote communities, which is why places such as Puerto Rico should have special considerations when looking at staffing levels and services.” Many employees that will participate in the instant election live in rural communities.

**The evidence is clear that the post office in Puerto Rico has serious problems handling correspondence and burdensome delays.** Region 12 did not consider these developments and merely noted that if there was a problem with the mail ballots it would be the employer’s fault if the addresses were incorrect. **The Board can also take administrative or judicial knowledge that recent mail ballot elections in Puerto Rico created overvotes.**

In the recent 2020 general elections, mail ballots were used for the first time in the Commonwealth for a substantial group of the overall population. The result was an overvote of thousands of votes in the Municipality of San Juan and a contested election in the courts. Two of the five electoral commissioners of the

main political parties refused to certify the results of several races. The President of the Electoral Commission and Judge Francisco Rosado Colomer admitted that he did not have an explanation as to why the Commission could not establish the difference in votes and the overvote. *See Natal v. Romero*, Civil No. SJ2021CV00284. We do not want that unnecessary controversy in this matter.

The crisis with the postal system and the lack of confidence in mail ballots have not deterred manual elections in Puerto Rico. Primaries and political elections are held regularly in the Commonwealth without presenting any problems whatsoever. Likewise, there are concerts, sport events and activities with thousands of individuals which are held on a daily and weekly basis.

**The facts show that there are serious doubts about the adequate operation of the postal system in the Commonwealth and there is an objective and safe manner to avoid handing this election to an untrustworthy partner: the USPS.** As such, the Region cannot comply with the Order issued in *CenTrio Energy* regarding the efficacy of the postal service and a mail ballot election should not be considered.

**C. A manual election is necessary**

**- The NLRB favors manual elections**

There is strong policy favoring manual elections. In *Aspirus*, the Board reiterated its decades long policy of favoring manual elections and noted that:

The Board has a long and proud tradition of conducting elections by manual balloting. *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1057 (1997). Given the value of having a Board agent present at the election—a circumstance which is not possible in mail-ballot elections—the Board's longstanding policy is that representation elections should, as a general rule, be conducted manually, either at the employees' workplace or some other appropriate location. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). Under this policy, the applicable presumption favors a manual, not mail-ballot, election. *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998).

The Board's policy is that manual elections are more trustworthy and efficient than mail in ballots. This is not something new. It was thoroughly discussed in *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). This reasoning was recently followed by the Region in *Starbucks Corporation & Workers United*, Case 12- RC-29197, issued on April 13, 2022.

- **The NLRB's case-handling manual limits mail ballot elections**

The case-handling manual establishes that: “the **Board's longstanding policy should, as a general rule, be conducted manually.**” The only exceptions recognized in the case-handling manual are that it is difficult for employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. These circumstances do not apply to this case.

May 2022 is not March 2020. A manual election can be held. All the

employees are vaccinated. The parties proposed dividing them in groups to make sure there is social distancing between them. All of them may wear masks. A manual election is not impractical and can be easily done. However, all of this was discarded by the Region. The employees can vote maskless in a closed classroom in Hialeah, Florida but Puerto Ricans that are fully vaccinated cannot vote with masks in an open space.

- **Even under the *Aspirus* factors, a manual election should be held**

The NLRB has established that there are five circumstances used to consider in determining whether a mail ballot election is appropriate.

**First**, whether the agency office tasked with conducting the election is operating under mandatory telework status. We understand that it is not.

**Second**, the proposed manual election site cannot be reasonably established in a way that violates mandatory state or local health orders. The employer is proposing that the election be held in an open area in the site, with physical distancing, compulsory masking, and the compliance of all COVID - 19 protocols. **Employees work on the site daily, and it complies with the strict mandates of the Commonwealth.**

**Third**, whether the employer accepts that it will abide by GC Memo 20-10. In the instant case, the employer is willing to accept all the requirements established in the GC Memo 20-10.

**Fourth**, if there is a COVID – 19 outbreaks at the facility. The employer can attest that there no current COVID – 19 outbreaks at the facility.

**Fifth**, the Region has ignored the 5% positivity factor. In *Starbucks*, the Region ordered a manual election in Miami Dade when there was a positivity rate of 10%; 76.9 % of population over 18 years of age were fully vaccinated and 35.5 % of the population over 18 years of age received a first booster shot. In the Commonwealth, the positivity rate is medium -which does not even require the use of masks in indoor settings pursuant to the CDC regulations –; **87.7% of the population over 18 years of age are fully vaccinated and 61.8 % of the individuals over 18 years of age have received a first booster dose.** If one compares, the factors in this case vs *Starbucks*, it is safer to vote in the manual election in the Commonwealth of Puerto Rico than in Miami – Dade.<sup>5</sup>

## CONCLUSION

Region 12 erred in issuing faulty, incorrect, and misleading Election Notices and Sample Ballots; conducting an independent of the record investigation of material facts; issuing a ruling that is not based on record and evidence and

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<sup>5</sup> All the data included is official information issued by the CDC. The employer used the same website cited by the Region in Starbucks. Once again, the Region verified those numbers in the website for Hialeah but did not do so for Puerto Rico. Also, the Region incorrectly states that there is no data for towns in Puerto Rico and that is incorrect. It is included in the same webpage. It seems that the Region’s investigative Google search was limited to metro stations in San Juan and not to other relevant matters in this case.

ignoring all of the safeguards that the parties stipulated so a 100% vaccinated population could manually vote. Because of the importance of the Board's determination in this matter and the potential prejudice that could result, the election should be stayed until the Board issues its determination.

Respectfully submitted in Guaynabo, Puerto Rico on June 2<sup>nd</sup>, 2022.

S/AGUSTIN COLLAZO MOJICA



## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on June 2<sup>nd</sup>, 2022, the undersigned caused a true and correct copy of the Employer's Request for Review of Regional Director's Decision and Direction of Election and Request to Stay Election to be filed electronically with the National Labor Relations Board and Region 12 using the NLRB's electronic filing system and also to be served upon the following counsel of record and parties via electronic mail to manuel@rodriguezbanachs.com on June 2<sup>nd</sup>, 2022.

S/AGUSTIN COLLAZO MOJICA